United States Supreme Court

October Term, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

against

IPPOLITO-LUTZ, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York entered herein on July 1, 1975, affirming the order of the Supreme Court of the State of New York, entered on May 22, 1967, striking petitioner's answer to the complaint herein and directing that the respondent have judgment in the sum of $328,820.01, with interest, against the petitioner and also affirming the judgment entered upon such order. On November 20, 1975, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal from the aforementioned order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York and said order became final.

OPINIONS BELOW

The order of the court below, upon which review is herein sought, was accompanied by a decision without opinion, reported at 48 A.D. 2d 1018, 373 N.Y.S. 2d 335 (App.-1*).

The order of the Supreme Court of the State of New York entered below was accompanied by an unreported memorandum opinion (App.-2).

Petitioner's motion for leave to appeal to the Court of Appeals of the State of New York was denied by order of that Court, without opinion.

JURISDICTION

The final order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York was made and entered on July 1, 1975 (App.-4). A motion for leave to appeal from this order to the Court of Appeals of the State of New York was denied by an order entered on the 21st day of November, 1975 (App 6). The jurisdiction of this Court is invoked under Title 29 U.S.C. Section 1257(3).

* All references to App. are to the Appendix following the conclusion of this petition and to the page number thereof.

QUESTIONS PRESENTED

1. Where the trial court judge knew of an abortive **bona fide** attempt by petitioner to make proper disclosure to its adversary, did the invocation of the sanction of striking petitioner's entire responsive pleading, pursuant to Section 3126 of the Civil Practice Law and Rules of the State of New York for failure to make proper disclosure, violate petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States?

2. Where petitioner's responsive pleading set forth several independent affirmative defenses and counterclaims in addition to its general defense, did the Court's striking of the entire responsive pleading as a sanction for failure to make proper disclosure, violate the petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States in the absence of an inquiry or finding by the Court that the material and documents sought through discovery procedures were relevant to the affirmative defenses and counterclaims?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provision involved is Section One of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The principal statutory provision involved is Section 3126 of the Civil Practice Law and Rules of the State of New York (McKinney's Consolidated Laws of New York, Book 7B, CPLR 3101-3200, p. 639):

> Section 3126. Penalties for refusal to comply with order or to disclose.
>
> If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them:

> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

STATEMENT OF THE CASE

Petitioner is a corporation organized under the Public Housing Law of the State of New York for the purpose of providing public housing in the City of Cohoes, New York.

On May 27th, 1960, petitioner and respondent entered into a contract whereby respondent agreed to furnish all the labor, materials, and equipment required for the general construction of Cohoes Housing Project NY 22-1 at Cohoes, New York.

In 1963 respondent commenced this action against petitioner, seeking money damages totalling $328,820.01 for breach of contract, retained percentage, extras and delay damages. A copy of the complaint is set forth at App.-7.

Petitioner's amended answer interposed a general denial, as well as seven affirmative defenses and two counterclaims. A copy of the amended answer is set forth at App.-9.

In November of 1966, respondent brought on a motion to invoke Section 3126 of the Civil Practice Law and Rules, striking the petitioner's answer for failure to comply with a prior order of the Supreme Court of the State of New York, directing petitioner to comply with a notice for discovery and inspection of certain documents. This motion was made returnable at a Special Term of the Supreme Court before Judge Pennock on December 9, 1966. On that date, petitioner's counsel appeared before the Court with all the documents of which discovery was sought. Up until the time they had received the notice of motion, petitioner's counsel had been unaware of the outstanding order as they had only recently assumed the duties of counsel for petitioner. Once aware of the outstanding order, petitioner's counsel had immediately taken steps to comply with the order. On appearing at Special Term on December 9, 1966, petitioner's counsel had available the documents sought through discovery. However, respondent's counsel did not appear in Court and petitioner was unable to transfer the documents at that time.

Judge Pennock reserved decision on respondent's motion. Decision was also reserved on a motion to set a date for an examination before trial of John F. Kelly, a former officer of the petitioner, who was reluctant to give a deposition.

In the ensuing weeks, petitioner's counsel attempted to arrange a date for the examination before trial, at which time the documents would be presented to respondent's counsel. Such a date could not be arranged. On May 8, 1967, Judge Pennock rendered an opinion setting May 22, 1967 as the time for the examination before trial. An order was made to this effect, and petitioner's counsel began preparations to present the voluminous documents for inspection at that time. However, on May 11, 1967, Judge Pennock rendered a decision upon the December 9, 1966 motion to strike the petitioner's answer for failure to comply with the order for discovery and inspection. The Judge ruled that respondent's motion was to be granted in its entirety and petitioner's answer was to be stricken.

Upon receipt of the Court's opinion, petitioner's counsel immediately went to Judge Pennock to request that he hear a motion for reargument of the motion. Counsel felt the action taken by Judge Pennock was too drastic and not in accord with New York case law on the invocation of Section 3126 penalties for failure to disclose. This case law is largely based on due process considerations. Petitioner's counsel expressed their opinion that, in light of their attempt to comply with the order for discovery on December 9, 1966 and their intent to produce the documents at the upcoming examination before trial, the Court's action was a denial of due process under both the New York and United States Constitutions. Judge Pennock refused to sign the submitted order to show cause for reargument. He then told counsel to produce Mr. Kelly on May 22, 1967 and to have all the records available. John F. Kelly was ordered to and did appear before Judge Pennock in open court on May 22, 1967

in the courthouse at Albany, New York, ready to submit to the examination before trial pursuant to the Court's decision. A hand truck, upon which the papers and records sought by respondents were loaded, was delivered outside the chambers of Judge Pennock. The matter of the examination before trial was called, and Judge Pennock, speaking from the bench, excused Mr. Kelly from further appearance and retired to chambers, where the motion to settle the order which struck the petitioner's answer was then undertaken. Once again, the Court was asked to reconsider petitioner's motion for reargument. The request was denied, whereupon Judge Pennock signed the order striking the answer of the Cohoes Housing Authority and allowing default judgment for the entire sum prayed for in the complaint to be entered (App.-14). An appeal was taken to the Appellate Division of the Supreme Court for the Third Judicial Department from the entry of the order striking the answer and from the judgment thereupon entered.

Upon appeal, petitioner argued that Judge Pennock erred, as a matter of law, in striking petitioner's answer under the attendant circumstances. In its argument, petitioner cited many New York Court decisions dealing with both the extent of power conferred by Section 3126 of the Civil Practice Law and Rules and the constitutional limitations on any such power. These two issues are inextricably related. The principal case cited by petitioner upon appeal was **Feingold** v. **Walworth Bros.**, 238 N.Y. 446, 144 N.E. 675. The questions certified for appeal in the **Feingold** case, **supra**, illustrate the ease with which the two issues are juxtaposed:

> "(1) Does an order made in this action, striking out the defendants' answer and granting judgment in favor of the plaintiff, violate section 6 of article 1 of the Constitution of the state of New York and the Fourteenth Amendment to the Constitution of the United States?

> (2) Is section 325 of the Civil Practice Act, in so far as it authorizes the court to strike out an answer and grant judgment in favor of the plaintiff, constitutional?
>
> (3) In this action to recover damages for fraudulent representations, where the answer not only contains denials of the alleged fraud, but in addition separate affirmative defenses of accord and satisfaction and general release under seal upon failure of the defendants to obey in part an order directing a discovery and inspection, does an order made pursuant to section 325 of the Civil Practice Act, striking out the answer and granting judgment in favor of the plaintiff, deprive the defendants of property without due process of law?
>
> (4) Did the facts in this case, as found by the Court, constitute as a matter of law 'a proper case' within the meaning of section 325 of the Civil Practice Act, for the making of an order striking out the answer and granting judgment in favor of the plaintiff?
>
> (5) Upon the facts in this case, as found by the court, was the court authorized to make an order striking out the answer and granting judgment in favor of the plaintiff?"
>
> 238 N.Y. at pp. 447-48

By specially citing the **Feingold** case as the principal case supporting their position upon appeal, petitioners raised the constitutional questions upon which petitioner seeks review. These questions permeate any discussion of the proper invocation of statutory power to strike a pleading on account of non-disclosure.

Statement of the Case

The Appellate Division for the Third Judicial Department of the Supreme Court of New York unanimously affirmed Judge Pennock's action in a decision rendered without opinion. It is this affirmance upon which petitioner seeks review by this Court.

Before it began seeking this remedy, however, petitioner sought to have the Appellate Division's determination reviewed by the New York State Court of Appeals. On motion for leave to appeal, petitioner cited the same issues as it had in the Appellate Division. An excerpt from petitioner's brief on this motion, which excerpt is also found in petitioner's brief upon appeal to the Appellate Division, is appended hereto (App.-15). On November 20, 1975, by order of the Court of Appeals of New York State, petitioner's motion for leave to appeal was denied. Said order was entered by the Clerk of the Court of Appeals on November 21, 1975.

Petitioner has now exhausted all the remedies available to him in the courts of the State of New York and seeks review by this Court of the now final determination of the Appellate Division for the Third Judicial Department of the Supreme Court of New York State.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case presents squarely the issue of the limits to which a court can go in invoking penalties for failure to disclose without going beyond the bounds of the Due Process Clause of the Fourteenth Amendment.

2. The actions and decisions of the New York State courts at issue in this proceeding have not been in conformance with the opinions set forth in the following decision rendered by this Court: **Hovey** v. **Elliott**, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215; **Hammond Packing Co.** v. **Arkansas**, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Am. Cas. 645; and **Societe Internationale** v. **Rogers**, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255.

a) This court has held that courts possessing plenary power to punish for contempt can not, on the theory of punishing for a contempt, summarily deny a party the right to defend an action without destroying the fundamental guarantee of due process. **Hovey** v. **Elliott**, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215. In **Hammond Packing** v. **Arkansas**, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, Am. Cas. 645, the Court recognized a distinction between the denial of the right to defend as mere punishment and the denial of such right to punish defendant for the suppression of material evidence in its possession:

> "In the former, due process was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. . . In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material

Reasons Relied on for the Allowance of the Writ

> facts alleged or pleaded were admitted by not answering. . .'' **Hammond, supra,** 212 U.S. at 351.

Where a court strikes a pleading as a sanction for failure to disclose evidence, in order for such striking to be consistant with the guarantee of due process, there must exist a situation wherein the court may reasonably presume that the failure to disclose reflects upon the merits of the allegations to be stricken. That such a presumption does not always arise in event of a failure to disclose was recognized by this Court in **Societe Internationale** v. **Rogers,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255, wherein the Court found that the necessary presumption did not arise since the failure to disclose had ''been due to inability, and not to wilfulness, bad faith, or any fault'' of the non-disclosing party. **Societe Internationale, supra,** 357 U.S. at 212.

The case upon which review is being sought plainly presents a failure of the New York courts to recognize the due process considerations inherent in the striking of petitioner's responsive pleading. Any presumption that the petitioner's failure to comply with the order for discovery and inspection was tantamount to a lack of substantive merits of its asserted defenses and counterclaims was overcome by the salient fact that petitioner's counsel twice tendered the material to respondent with the court's knowledge. Both tenders were made prior to the settlement of the order striking petitioner's answer. Under these circumstances, it can hardly be presumed that petitioner's failure to disclose was indicative of any lack of merit to its defense. Once petitioner indicated a willingness to comply with the order for disclosure, the presumption necessary to preserve due process in the striking of petitioner's answer disappeared. No longer was such action based on the presumption of admission, but rather it constituted a punishment for contempt, denying the petitioner due process of law.

Reasons Relied on for the Allowance of the Writ

b) Even if it is assumed that the presumption of admission was present in the instant case, the order striking petitioner's entire answer with all its affirmative defenses and counterclaims embodied a denial of due process because it was overbroad.

As this court stated in **Hammond, supra:**

> the striking of a pleading finds . . . its sanction in the undoubted right of the law-making power to create a presumption of fact as to the bad faith or untruth of an answer begotten from the suppression or failure to produce the proof ordered, **when such proof concerned the rightful decision of the cause.** 212 U.S. at 350-351 (emphasis added)

In order for the striking of a pleading on account of the pleader's recalcitrance in making disclosure to be within the bounds of the Fourteenth Amendment, there must be some nexus between the stricken pleading and the sought after material. This principal was stated and applied by the New York Court of Appeals in the case of **Feingold** v. **Walworth Bros.,** 238 N.Y. 446, 144 N.E. 675:

> ''When a defendant refuses to produce books and papers relating to the merits of the action, he may be deprived of the right to assert that, as far as they relate to the merits of the action he has a good defense. The presumption arises that a failure to produce such evidence is an admission that it exists. The punishment is for withholding proof, and is properly limited to excluding what the proof presumptively establishes. But to punish generally for a refusal to produce by striking out an entire answer, which not only puts in issue all the material allegations of the complaint, but includes affirmative defenses, comes perilously

Reasons Relied on for the Allowance of the Writ

> near the denial of due process of law. Take, for example, the case where the answer includes affirmative defenses and counterclaims. The defendant, by a failure to make proper discovery going to the merits of the entire action, may be precluded from denying the allegations of the complaint, by striking out his denials; but does any legitimate inference follow from such failure that it has not abundant proof to establish its defenses and counterclaims? The power to punish is limited by the presumption which attaches to the suppression of the evidence suppressed." 238 N.Y. at 454-55.

The instant case presents the exact situation hypothesized by the New York Court of Appeals in the **Feingold** case, **supra**. The petitioner's amended answer (App.-9) sets forth seven separate affirmative defenses. Two of these, the first and seventh, are based solely upon interpretation of contract or statute and involve no fact finding at all. In addition, the amended answer sets forth two counterclaims against the respondent.

As set forth in Judge Pennock's decision to strike the entire answer (App.-2), the issues to which the information requested was relevant were "deemed resolved for the purposes of the action in accordance with the allegations of the complaint. . ." It is clear that any presumptions that arose from petitioner's tardy disclosure were only relevant to the allegations of the complaint and the denial of these allegations by petitioner. No presumption arose as to the affirmative defenses and counterclaims alleged in the amended answer. It is equally clear that the striking of petitioner's entire responsive pleading, as opposed to only striking the denial therein, was an unconstitutional means of punishment for contempt, rather than the legitimate creation of a reasonable presumption.

Reasons Relied on for the Allowance of the Writ

By affirming the action taken by the Supreme Court of the State of New York herein, the Appellate Division has denied the petitioner due process of law. The power to strike petitioner's answer never arose, or, if it did arise, it did so only to a degree limited by considerations of due process of law. "The fundamental conception of a court of justice is condemnation only after hearing." **Hovey** v. **Elliott, supra,** 167 U.S. at 413-14. "The Court must be careful not to become an instrument of injustice, even against a person who has forfeited all claims upon its favor." **Hovey** v. **Elliott, supra,** 167 U.S. at 442-43. The denial of due process by an exasperated state court, even if such exasperation was justified, is surely a matter which this court should consider on review.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

HARVEY AND HARVEY
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Attorneys for Petitioner
Office and P.O. Address
29 Elk Street
Albany, NY 12207
(518) 463-4491

APPENDIX

APPENDIX

DECISION OF APPELLATE DIVISION
THIRD DEPARTMENT

(Reported at 48 A.D. 2d 1018, 373 N.Y.S. 2d 335)

IPPOLITO-LUTZ, INC.,
Respondent

vs.

COHOES HOUSING AUTHORITY,
Appellant

Supreme Court, Appellate Division, Third Department. June 26, 1975. William E. Noonan, Troy, for appellant. Jerrold Morgulas, New York City, for respondent. Order and judgment, Supreme Court, Albany County (Pennock, J.) entered on May 22, 1967 and July 18, 1967 respectively, affirmed, without costs. No opinion.

HERLIHY, P.J., and GREENBLOTT, KANE, LARKIN and REYNOLDS, J.J., concur.

MEMORANDUM OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

IPPOLITO-LUTZ, INC.,

Plaintiff

against

COHOES HOUSING AUTHORITY,

Defendant

(Supreme Court, Albany County Special Term)
(December 9, 1966)
(Calendar #130)

(Justice John H. Pennock, presiding)

Appearances:

M. Carl Levine, Morgulas and Foreman, Esqs., Attorneys for Plaintiff, 708 Third Avenue, New York, New York.

Murphy, Aldrich, Guy, Broderick and Simon, Esqs., Attorneys for Defendant, 297 River Street, Troy, New York.

Pennock, J.:

This is a motion to set a date for discovery and inspection.

The defendant has failed to comply with a prior order of this court. The defendant was obliged by the prior order of this court to produce the records within twenty days. No valid excuse has been offered by the defendant for its failure to comply and certainly ignoring an order of the court is willful under the circumstances. Otherwise the orderly process of the administration of justice pursuant to the rules would be abandoned. The present attorney for the defendant first appeared on this motion and indicated to the court that immediate steps would be taken to comply with the order. This he has failed to do in the last five months.

Memorandum

The claims of the plaintiff have been in a state of limbo for years and the defendant has been uncooperative and has failed to comply with an order of this court of July 25, 1966. Therefore, the court determines that the issues to which the information was requested is relevant and shall be deemed resolved for the purposes of the action in accordance with the allegations of the complaint, and the court determines that a motion is granted to strike the answer of the defendant. (Section 3126 CPLR.)

Plaintiff to submit order in accordance with this determination.

Dated: May 11, 1967

ORDER APPEALED FROM

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York commencing on the 12th day of May, 1975.

PRESENT:

HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT
HON. T. PAUL KANE
HON. JOHN L. LARKIN
HON. WALTER B. REYNOLDS
Associate Justices.

NEW YORK SUPREME COURT
APPELLATE DIVISION — THIRD JUDICIAL DEPARTMENT

IPPOLITO-LUTZ, INC.,
Plaintiff-Respondent,

against

ORDER

COHOES HOUSING AUTHORITY,
Defendant-Appellant.

Cohoes Housing Authority, Defendant-Appellant, having appealed from a judgment of the Supreme Court of Albany County entered on the 18th day of July 1967 in the office of the Clerk of the County of Albany and from an order of the Supreme Court of Albany County dated May 22. 1967 (Pennock, J.), and said appeal having been presented during the above stated term of this Court and having been argued by William E. Noonan, Esq., of counsel for the Defendant-Appellant and by Jerrold Morgulas, Esq.,

Order Appealed From

of counsel for the Plaintiff-Respondent and after due deliberation the Court having rendered a decision on the 26th day of June, 1975,

NOW on motion of M. Carl Levine, Morgulas & Foreman, attorneys for Plaintiff-Respondent, it is

ORDERED that the order of the Supreme Court Albany County (Pennock, J.) entered on the 22nd day of May, 1967 be and the same is hereby and in all respects unanimously affirmed and it is further

ORDERED that the judgment of the Supreme Court Albany County entered on the 18th day of July, 1967 be and the same is hereby in all respects unanimously affirmed.

ENTER

JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: July 1, 1975.
A TRUE COPY
JOHN J. O'BRIEN
Clerk

ORDER OF COURT OF APPEALS
STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November A.D. 1975

Present, **HON. CHARLES D. BREITEL, Chief Judge,** presiding.

IPPOLITO-LUTZ, INC.,

Respondent,

vs.

COHOES HOUSING AUTHORITY,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court

COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
County of Abany

[Same Title.]

Plaintiff complaining of the defendant, by M. Carl Levine, Morgulas & Foreman, its attorneys, alleges:

1. That at all times hereinafter mentioned, plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and authorized to do business in the State of New York.

2. That at all times hereinafter mentioned, the defendant was and is a corporation organized under the Public Housing Law of the State of New York.

3. That heretofore and on or about the 27th day of May, 1960, plaintiff and defendant entered into a contract, whereby plaintiff agreed to furnish all the labor and material, plant, tools and equipment required for the general construction of Contract No. 1, which contract is known as Cohoes Housing Project NY 22-1, at Cohoes, New York; and plaintiff incorporates said contract by reference herein and begs leave to refer to same upon the trial with the same force and effect as if set forth at length herein.

4. That said contract between plaintiff and defendant was duly entered into after due advertisement for bids therefor, and upon public letting and in complete compliance with the provisions of the Public Housing Law of the State of New York.

5. That thereafter plaintiff duly entered upon the performance of said contract and duly performed all the terms and conditions thereof on its part to be performed, except that plaintiff was prevented from completing the contract within the time therein provided, because of the illegal actions and breaches by the defendant, as more particularly hereinafter set forth.

Complaint

6. That the defendant breached its aforesaid contract, in that it has failed to pay to the plaintiff the balance due it under the contract and orders issued in connection therewith in the sum of $78,124.95.

7. That the defendant further breached its aforesaid contract, in that it improperly and illegally issued stop orders to the plaintiff, illegally and improperly interfered with and obstructed the plaintiff in the performance of its work, required plaintiff to stop work for long periods of time, required plaintiff to do work not called for or contemplated by the contract, plans, or specifications, failed and refused to pay for work ordered by the defendant in addition to and beyond that required by the contract, all to plaintiff's damage in the sum of $250,695.06.

8. That pursuant to the provisions of law in such cases made and provided, plaintiff duly presented the aforesaid claim, in writing, to the defendant for adjustment, and more than thirty days have elapsed since the presentation of said claim, but the defendant has failed and refused to make any adjustment or payment thereof for more than thirty days after such presentation.

9. That there is now due and owing by the defendant to the plaintiff the sum of $328,820.01, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $328,820.01, with interest thereon, together with the costs and disbursements of this action.

M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for plaintiff

AMENDED ANSWER

STATE OF NEW YORK, SUPREME COURT,
County of Albany

[Same Title.]

Defendant, through its attorney, John F. Kelly, for an amended answer to the plaintiff's complaint, respectfully alleges:

1. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph No. "1".

2. Admits the allegations contained in Paragraphs Numbered "3" and "4".

3. Defendant denies that the plaintiff duly performed all of the terms and conditions of said contract on its part to be performed, and specifies that the plaintiff has failed to perform and complete its contract in that there still remains to be built, repaired, corrected and rebuilt certain items, all as set forth in Exhibit "A", a copy of which is hereunto annexed and made a part hereof.

4. Denies each and every allegation contained in Paragraphs numbered "6", "7", "8" and "9" of plaintiff's complaint, and more specifically and particularly alleges that plaintiffs have failed, neglected and refused to perform, and there have not occurred, the conditions precedent in the contract alleged in paragraph 5 of the complaint which are hereinafter more specifically and particularly set forth in the "Second" affirmative defenses hereinafter in this answer pleaded, each and every allegation whereof is hereby referred to and herein incorporated as if the same were more fully and at length set forth herein.

Amended Answer

As and for a first, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

5. That said contract document executed on the 27th day of May, 1960, between the plaintiff and the defendant herein contained a specific provision, to wit, Section 13b of the General Conditions, as follows: "No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable."

As and for a second, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

6. That the plaintiff has failed to comply with the requirements of Paragraph 9d, General Conditions in that plaintiff has not furnished the Local Authority with a release in satisfactory form of all claims against the Local Authority arising under and by virtue of this contract and further that the work required under said contract has not been completed or accepted by the Local Authority or the Public Housing Administration and further has not been certified as completed by the Architect.

As and for a third, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

7. That the plaintiff has failed to provide to the defendant releases or receipts from all persons performing work and supplying material to plaintiff, notwithstanding a demand therefore.

As and for a fourth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

8. That the requirements of Section 10 General Conditions have not been complied with in that the approval of the Local Authority, the Architect and the Public Housing

Amended Answer

Administration have not been obtained all of which is required by said Section 10 of the General Conditions as a condition precedent to payment for any changes in the work.

As and for a fifth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

9. That the plaintiff has wholly failed to comply with any or all of the provisions of Section 15, General Conditions with reference to disputes, of the contract referred to in Paragraph 3 of the complaint herein in that plaintiff has failed to submit its claim and proof in detail.

As and for a sixth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

10. That by virtue of the provisions of the General Conditions, Article 9, Subdivision (b), the defendant is entitled to retain a portion of the contract price until final completion and acceptance of all work covered by the contract.

As and for a seventh, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

11. That Section 157 of the Public Housing Law of the State of New York provides as follows:

"1. In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand claim or claims upon which such action or special proceeding was founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

Amended Answer

As and for a counterclaim herein the defendant respectfully alleges:

The defendant reiterates each and every allegation contained in Paragraphs 2, 3 and 4 of the plaintiff's complaint herein with the same force and effect as if the same were set forth fully at length.

That Article 3 of the Special Conditions entitled "Liquidated Damages" provides as follows:

"(a) As actual damages for any delay in completion are impossible of determination, the contractor (except for lawns and planting work) and his sureties shall be liable for and shall pay to the Local Authority the sum of $100. as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted."

That the plaintiff has failed to complete his contract within the allotted time of 540 days in that he has exceeded said time by 270 days, resulting in damage to the Housing Authority of $27,000. all as provided in said contract.

As and for a second counterclaim herein defendant respectfully alleges:

1. That it reiterates each and every allegation contained in Paragraphs 2, 3 and 4 of the plaintiff's complaint with the same force and effect as if the same were set forth fully at length herein. That contrary of the provisions of said contract between the plaintiff and the defendant the plaintiff has failed to provide temporary heat, watchmen service and specified framing and has failed to build, correct and repair each and every item set forth heretofore in Exhibit "A", all to the damage of the defendant in the sum of $150,000.

Amended Answer

WHEREFORE defendant demands that the complaint of the plaintiff be dismissed and further that the defendant have affirmative judgment in the sum of $177,000. together with the costs and disbursements in this action.

JOHN F. KELLY
Attorney for Defendant

ORDER OF SUPREME COURT OF NEW YORK STATE

At a Special Term Part of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany Courthouse, on the 22nd day of May, 1967.

Present:
Hon. John H. Pennock, Justice.

[Same Title.]

Upon plaintiff's notice of motion dated November 21, 1966, the affidavit of Jerrold Morgulas, duly sworn to the 21st day of November, 1966, in support of said motion for an order pursuant to Rule 3126 of the Civil Practice Law and Rules, striking defendant's answer for failure to comply with a prior order of this Court directing defendant's compliance with a notice to produce and for discovery and inspection, served under date of January 17, 1966, and upon the affidavit of William E. Noonan, Esq., duly sworn to the 1st day of December, 1966 in opposition thereto, and said motion having come on duly to be heard before me on the 9th day of December, 1966, and due deliberation having been had thereon, and a decision in writing having been made and dated May 11, 1967, it is

On motion of M. Carl Levine, Morgulas & Foreman, attorneys for plaintiff.

ORDERED, that the answer of the defendant, Cohoes Housing Authority, be and the same is hereby stricken and it is further

ORDERED, that plaintiff have judgment against the defendant in the sum of $328,820.01, as demanded in the complaint, with interest from March 20, 1963.

ENTER

JOHN H. PENNOCK
J. S. C.

EXCERPT FROM PETITIONER'S LOWER COURT BRIEF

Section 3126 CPLR speaks only of a refusal to obey an order for disclosure or a wilful failure to disclose information which a court finds ought to have been disclosed, and provides alternate avenues of relief, the most drastic of which is the striking of a pleading. Based upon what we have heretofore said and upon the matters set forth in the record on appeal, we say that there is absolutely no evidence of wilfulness or intended disobedience, or intended refusal to obey the order for disclosure. As we have said before, this contest was a "hot" one, made so only by way of the zeal and desire upon the part of the plaintiff's attorneys as well as attorneys who preceded the writer of this brief, to adequately and fully protect and advance the legal rights of their respective clients. The absence of any wilfulness or disobedience on the part of the defendant Housing Authority itself, is certainly evidenced by the fact that they had no notice of the matter whatsoever, and it is important to bear in mind that there had been a complete change in the membership of the governing board of the Housing Authority between the time that this lawsuit was begun and the time when Justice Pennock ordered the disclosure. Had this writer known of the requirement to produce for discovery and inspection, it would have been just as easy to produce the hand truck full of records at any time agreeable to the plaintiff's attorneys, for it is evident that everything sought to be discovered was twice produced in court — once, on the 9th day of December, 1966, at a special term, and again, on the 22nd day of May, 1967, when the examination before trial of the defendant, through its former executive director, John F. Kelly, Esq., was to be conducted.

It has been said that Courts are loathe to invoke such a drastic penalty as was here invoked, and it seldom has been done, because it is the general policy of our Courts to favor the disposition of controversies on the merits rather

than to impose, as was done in the instant case, the maximum punishment permitted under our practice, that is, the striking of an answer in a substantial case and the ordering of a default judgment in the amount of $371,512.52 against a public housing corporation.

Feingold v. Walworth Bros., 238 N.Y. 446

Even when a presented factual situation strongly suggested that the defendant's conduct was purposeful when he failed to appear for an examination before trial, the First Department Appellate Division refused to sanction the drastic remedy of striking an answer.

Nomako v. Ashton, 22 A.D. 2d 683

In the instant case the defendant Public Housing Authority, whose executive director and attorney and whose trial attorney had no actual notice of the order for discovery and inspection, has had its answer stricken and a substantial judgment entered against it without ever having its day in court for a true test on the merits. We say that in the absence of actual notice and knowledge, evidence of wilful disobedience of a known order or a failure to produce under circumstances clearly deliberate and contumacious, that the Court erred as a matter of law in ordering the striking of an answer and the entry of a default.

DuBois v. Iovinelli, 15 A.D. 2d 616;
Mills v. Copello, 6 A.D. 2d 841;
Mack v. Edell, 284 App. Div. 1022;
Page v. Lalor, 24 A.D. 2d 883;
Balsam v. Frank Nicolosi Building Co., 36 A.D. 2d 533;
Cinelli v. Radcliffe, 35 A.D. 2d 829;
Thornlow v. Long Island R.R. Co., 33 A.D. 2d 1027;
Goldner v. Lendor Structures, 29 A.D. 2d 978;
LaManna Concrete v. Friedman, 34 A.D. 2d 576.